YAP NGEN SANG v. YAP YOKE CHONG

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[CIVIL SUIT NO: WA-22NCVC-676-12-2015]
4 DECEMBER 2017

SUCCESSION: *Letters of administration – Revocation of grant – Application for – Whether parties beneficiaries of estate – Proof of lineage – Whether there was sufficient cause to revoke letter of administration – Whether letter of administration ought to be amended instead*

The plaintiff commenced this suit against the defendant to revoke the grant of letter of administration obtained by the defendant in respect of the estate of one Shum Poh Sum ('the deceased'). In the alternative, the plaintiff sought an order that the plaintiff be added as a personal representative and beneficiary in the grant. The deceased was the wife of Yap Ah Shak, the fourth Capitan Cina of Kuala Lumpur, who succeeded Yap Ah Loy in 1885 until his death in 1889. The deceased, who died intestate, was the registered owner of an undivided ¾ share in a piece of land ('the land'). On 11 March 2012, the Kuala Lumpur High Court granted an order for a declaration that the deceased was presumed dead on 13 June 1951. Thereafter, the defendant obtained the letters of administration for the estate of the deceased. The plaintiff, however, claimed that his father was Yap Hong and his grandfather was Yap Chin Fook, one of the sons of the deceased and Yap Ah Shak. Therefore, the plaintiff contended that he was the beneficiary of the deceased. The defendant refuted the plaintiff's claim as beneficiary of the deceased. The evidence adduced by the defendant to show that he was the deceased's beneficiary was, *inter alia*, a copy of lease for mining land which showed that the defendant's father Yap Phooi Fong was the administrator of the estate of Yap Fatt Yew (son of Yap Ah Shak and the deceased). As such, the defendant claimed that he was the beneficiary of the estate of the deceased. The core issue in this case was whether the plaintiff was a beneficiary of the deceased, who was one of the wives of Yap Ah Shak as well as whether the defendant was the beneficiary of the deceased.

Held (allowing plaintiff's claim in part; ordering defendant to pay costs to plaintiff):

(1) The plaintiff relied on important documentary evidence to show his lineage with Yap Chin Fook and Yap Ah Shak, which included the tombstone of the deceased at the Kwong Tung Cemetery. The inscriptions on the tombstone of Yap Chin Fook at the same cemetery showed that one of Yap Chin Fook's sons, Yap Hong, was the plaintiff's father. The existence of the tombstones of the deceased and Yap Chin

A Fook were confirmed by PW3, the Administration Manager of Association of Kwong Tung Cemetery. As the inscriptions on the tombstone of Yap Chin Fook and the deceased were documents as defined under s. 3 of the Evidence Act 1950, and with the confirmation of its existence according to the records of the said cemetery, the said
B inscriptions were admissible under the said Act. Thus, the plaintiff had proved that he was the beneficiary of the deceased. (paras 17-21 & 31)

(2) In the lease for mining land for District of Kuala Lumpur No. 3923, this piece of evidence indicate that Yap Phooi Fong, the defendant's father, was the administrator of the estate of Yap Fatt Yew, the son of the
C deceased and Yap Ah Shak. The plaintiff's income tax returns from 1973 to 1978 also showed that the defendant was the assignee of dividend payable to the estate of Yap Fatt Yew and estate of Yap Ah Shak and the birth certificate of the defendant showed that the defendant's father was Yap Phooi Fong. The combination of oral and documentary
D evidence adduced herein also showed that the defendant too was the beneficiary of the deceased's estate. (paras 34-37)

(3) The facts adduced by the defendant in the application for the letters of administration were found to be untrue. Section 34 of the Probate and Administration Act 1959 gave the court the discretionary power to
E revoke or amend any probate and letters of administration. Having considered the totality of evidence with the paramount interest of all the beneficiaries in mind, there was no sufficient cause to revoke the letter of administration but there was sufficient cause to amend the said letter of administration. (paras 44, 46 & 47)

F **Case(s) referred to:**

Dato' Dr Zambry Abd Kadir v. Dato Seri Ir Hj Mohammad Nizar Jamaluddin (Attorney General of Malaysia, Intervener) [2009] 5 CLJ 265 CA ***(refd)***

Haines v. Guthrie [1884] 13 QBD 818 ***(refd)***

Jigarlal Kantilal Doshi v. Damayanti Kantilal Doshi & Ors [1995] 1 LNS 279 HC ***(refd)***

Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 1 LNS 340 HC ***(refd)***

G *Re Khoo Boo Gong, Decd, Khoo Teng Seong v. Teoh Chooi Ghim & Ors [1981] 1 LNS 78 FC* ***(refd)***

Seow Beng Hay v. Seow Soon Quee & Anor [1933] 1 LNS 126 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 3

H Probate And Administration Act 1959, s. 34

For the plaintiff - Jason Chan; M/s S Mathews & Assocs
For the defendant - PS Gill; M/s Gill & Tang

Reported by Suhainah Wahiduddin

I

JUDGMENT

Nordin Hassan J:

Introduction

[1] The plaintiff commenced this suit against the defendant to revoke the grant of letter of administration dated 16 June 2013 obtained by the defendant in respect of the estate of one Shum Poh Sum ('the deceased').

[2] In the alternative, the plaintiff seeks an order that the plaintiff be added as a personal representative and beneficiary in the grant.

Background Facts

[3] The undisputed facts in this case are as follows:

(i) Shum Poh Sum ('the deceased') was one of the wife of Yap Ah Shak, the fourth Capitan Cina of Kuala Lumpur who succeeded Yap Ah Loy in 1885 until his death in 1889.

(ii) The deceased, Shum Poh Sum who died intestate was the registered owner of an undivided 3/4 share in a piece of land in Ampang known as Geran No. 60391, Lot No. 1, Section 10, Bandar Ampang, Daerah Ulu Langat, Selangor ('the land'). The registered proprietor of the remaining 1/4 share of the land is Choo Lin Cheong who also died intestate.

(iii) On 11 March 2013, upon the application by the defendant, the Kuala Lumpur High Court granted an order for a declaration that Shum Poh Sum to be presumed dead on 13 June 1951.

(iv) Thereafter, on 16 June 2013, the defendant had obtained the letters of administration for the estate of the deceased. In the defendant's affidavit in support of the application for the said letters of administration dated 16 April 2013, the defendant deposed the following facts.

   (a) Shum Poh Sum, the deceased, was the defendant's great grandmother and died on 13 June 1951. The deceased resided at the defendant's family residence at No. 53, Bukit Bintang Road, Kuala Lumpur until her death.

   (b) The deceased had only one child namely Yap Fatt Yew who died on 20 December 1938, leaving only one child which is Yap Phooi Fong, the defendant's father. Yap Phooi Fong died intestate on 4 March 1990.

   (c) In the petition for the letters of administration, the defendant averred that the defendant is the only son of Yap Phooi Fong and the only great grandchild of Shum Poh Sum, the deceased and the sole beneficiary.

A **The Plaintiff's Case**

[4] The plaintiff claims that his father is Yap Hong and his grandfather is Yap Min Fook, who is one of the sons of Shum Poh Sum and Yap Ah Shak. Therefore, the plaintiff contends that he is the beneficiary of Shum Poh Sum, the deceased.

B

[5] The documentary evidence adduced by the plaintiff to prove that he is the beneficiary of the deceased among others are the information from the deceased's tombstone and the cemetery records kept by the Association of Kwong Tong Cemetery Management, Kuala Lumpur.

C **[6]** The plaintiff also testified that his father had also brought the plaintiff from young to his grandfather, Yap Chin Fook's grave during Ching Beng festival and his father did mention about 'family land' not far from where they had lived.

[7] The plaintiff also contends that the defendant has failed to prove that D the defendant is the deceased's beneficiary.

The Defendant's Case

[8] The defendant, on the other hand, submits that Yap Ah Shak had several wives and had three sons namely Yap Loong Hin from Yap Ah E Shak's first wife, Yap Chin Fook from his second wife and Yap Fatt Yew, the son of Yap Ah Shak with Shum Poh Sum, the fourth wife. Yap Fatt Yew is the father of Yap Phooi Fong and the grandfather of the defendant. As such, the defendant claim that he is the beneficiary of the estate of the deceased.

[9] The evidence adduced by the defendant to show that he is the F deceased's beneficiary are as follows:

(i) A copy of lease for mining land which shows that the defendant's father Yap Phooi Fong was the administrator of Yap Fatt Yew's estate.

(ii) A copy of birth certificate of the defendant which shows that the G defendant is the son of Yap Phooi Fong.

(iii) The income tax returns that shows the defendant was the assignee of the dividends payable to the estate of Yap Fatt Yew from the estate of Yap Ah Shak.

H (iv) The oral evidence of the defendant that his father, Yap Phoon Fong used to collect rental from the tenants occupying the said land.

[10] The defendant refutes the plaintiff's claim as beneficiary of the deceased. The defendant was also informed by Yap Chee Meow who is the grandson of Yap Chin Fook that his father Yap Kit Fong was the only son I of Yap Chin Fook.

Findings Of This Court

[11] The core issue in this case is whether the plaintiff is a beneficiary of Shum Poh Sum, the deceased, who was one of the wives of Yap Ah Shak as well as whether the defendant is the beneficiary of the deceased.

[12] The plaintiff in his evidence testified that his grandfather, Yap Chin Fook is one of the son of Shum Poh Shum and Yap Ah Shak who passed away in 1945 when plaintiff was three years old. The plaintiff was often told by his father Yap Hong that Yap Ah Shak was the plaintiff's great grandfather. Yap Ah Shak was once rich and famous but fail to manage his wealth and was then declared bankrupt.

[13] The plaintiff also said that it has been the plaintiff's family tradition to visit the plaintiff's grandfather's tomb every Ching Ming or Cheng Beng festival to pay respect as his descendants at Kwong Tong Cemetery Kuala Lumpur.

[14] The plaintiff's father has also shown to the plaintiff the said land and told him that the land belongs to the Yap family.

[15] Here, it is pertinent for me to analyse any contemporaneous document before this court in order to determine whether the oral evidence of the plaintiff and the defendant are substantiated and proven. This is more important as the facts here relates to the events that occurred many years back and both parties claim that they are the beneficiaries of the deceased.

[16] In regards to this issue, it is instructive to refer to the Court of Appeal case of *Dato' Dr Zamry bin Abdul Kadir v. Dato Seri Ir Hj Mohammed Nizar bin Jamaluddin (Attorney General of Malaysia, Intervener)* [2009] 5 CLJ 265; [2009] 5 MLJ 464 where Raus Shariff JCA (as he then was) said this:

> [21] *It is trite law that when there is a conflict between the evidence witnesses, the court would resolve the conflict by relying on the uncontroverted documentary evidence which is neutral in nature. In Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229)* at p 234, Chang Min Tat FJ has this to say:
>
> > For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with the purpose of his own to serve and if it did not account for the statements in his documents and writing. Judicial reception of evidence requires that oral evidence be critically tested against the whole of the others evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...

A [22] In *Graze Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257, Lord Goff of Chiveley in delivering the judgment of the Privy Council, speaking on the same subject held that *it is of crucial importance for judges to have regard to the contemporary documents and to the overall probabilities when facing the task of assessing the evidence of witnesses* (see also *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 MLJ 433; *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1989] 1 MLJ 35; *Tan Sooi Shin v. Kow Kek Hing* [1991] 3 MLJ 390; [1991] 3 CLJ 1985 and *Kumagai Gumi Co Ltd v. Zenecon-Kumagi Sdn Bhd & Ors and Another Application* [1994] 2 MLJ 789). (emphasis added)

[17] Reverting to the present case, the plaintiff relies on two pieces of important documentary evidence to show his lineage with Yap Chin Fook and Yap Ah Shak.

[18] Firstly, is the tombstone of Madam Shum Poh Sum at the Kwong Tung Cemetery Kuala Lumpur. The inscription on the tombstone states the following:

(i) Tomb of Madam Tham who was married into the Yap family.

(ii) Sons: Chin Fook Fatt Yew

(iii) Daughter: Yap Tin

[19] Apart from the Shum Poh Sum's tombstone, the inscription on the tombstone of Yap Chin Fook at the same cemetery, shows that Yap Chin Fook's sons were Yap Khun and Yap Hong. Yap Hong is the plaintiff's father. Although the tombstone was erected in year 2000, it was erected based on the old tombstone.

[20] The existence of the tombstones of Shum Poh Sum and Yap Chin Fook at the said Kwong Tung cemetery were confirmed by PW3, the Administration Manager of Association of Kwong Tung Cemetery, Kuala Lumpur. According to the record book of the Association which is in SP3's custody, Yap Chin Fook was buried at the said cemetery on 1945 and the burial plot number is 15457. The record also shows that Shum Poh Sum was buried at the cemetery in 1937 with the burial plot number 23455 and the date on the tombstone is 1950. It is believed that 1950 is the date the tombstone was erected.

[21] Here, as the inscriptions on the tombstone of Yap Chin Fook and Shum Poh Sum are documents as defined under s. 3 of the Evidence Act 1950 and with the confirmation of its existence according to the records of Association of Kwong Tung Cemetery, the said inscriptions are admissible under the Act.

[22] Section 3 of the Evidence Act 1950, defines "document" as follows: A

> **'document'** means any matter expressed, described or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, soundtrack or other device whatsoever, by means of:
>
> (a) **Letters, figures, marks, symbols, signs, or other forms of expression, description, or representation whatsoever.** B
>
> (b) ... (d). (emphasis added)

The illustrations under the definition of 'document' among others is the following: C

> **An inscriptio**n on wood, metal, **stone** or any other substance, material or thing is a document. (emphasis added)

[23] In *Haines v. Guthrie* [1884] 13 QBD 818, the Court of Appeal accepted that inscription on a tombstone as evidence to show a person lineage or ancestry, Stephen J had this to say: D

> The rule according to which hearsay is admitted in cases or pedigree is first stated by Lord Mansfield in *Goodright v. Moss*, decided by the Court of King's Bench in 1777. In what case Lord Mansfield said:
>
> > Tradition is sufficient in point of pedigree. Circumstances may be proved. For instance, suppose from the hour of one child's birth to the death of its parent it had always been treated as illegitimate, and another introduced and considered as the heir of the family, that would be good evidence. An entry in a father's family bible, **an inscription on a tombstone,** a pedigree hung up in the family mansion (as the Duke of Buckingham's was), **are all good evidence.** So the declarations of parents in their lifetime. E F
>
> The principle upon which the rule depends is stated in *Vowles v. Young*, decided in 1806, and in *Whitelocke v. Baker*, decided shortly afterward.
>
> In *Vowles v. Young*; Lord Erskine said:
>
> > Courts of law are obligated, in cases of thus kind, to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established, and subject or property regulated, requiring are facts from the month of the witness who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence; the best of nature of the subject will admit, establishing the descent from the only sources that can be had. (emphasis added) G H

I

[24] On the same issue, Whitley J in *Seow Beng Hay v. Seow Soon Quee & Anor* [1933] 1 LNS 126; [1933] MLJ 111 also explained as follows:

> The onus is upon the plaintiff but in considering whether the evidence which he is able to adduce is sufficient to discharge that onus it has to be borne in mind as Lord Erskine observed in *Vowles v. Young*, 13 Vesey Junior 140, that **in cases of pedigree remote and slight evidence must be allowed effect.** That was a case in which the only point was a question of legitimacy and the following passage from his judgment at page 143 lays down the principles upon which the Court should act:
>
> > **Court of law are obliged in cases of this kind to depart from the ordinary rules of evidence: as it would be impossible to establish descent according to the strict rules,** by which contracts are established and subjects of property regulated: requiring the facts from the mouth of the witness, who has the knowledge of them. In cases of pedigree therefore recourse is had to a secondary sort of evidence: the best the nature of the subject will admit; establishing the descent from the only sources, that can be had.
>
> (emphasis added)

[25] In the present case, the evidence from the tombstone that Yap Chin Fook and Yap Fatt Yew are the sons of Yap Ah Shak is also supported by the historical records and articles produced in this case at p. 145 of bundle D1 and p. 7 of bundle D2.

[26] I also accept the plaintiff's contention that the pronunciation of 'Tham' on the tombstone of Shum Poh Sum is due to many dialects of the Chinese language and no standard romanisation of Chinese name. Furthermore, the description on the tombstone refers to Shum Poh Sum a person who was married to Yap family, having two sons Yap Chin Fook and Yap Fatt Yew and a daughter Yap Tin.

[27] The defendant who also confirmed that Shum Poh Sum and Yap Chin Fook were buried at Kwong Tung Cemetery has not shown other burial plot or tombstone of both the deceased other than the tombstone referred to by the plaintiff.

[28] Although the records of the Association shows that Shum Poh Sum was buried in 1937, and not 1951 as claimed by the defendant, it does not mean that the tombstone belongs to different person and not Shum Poh Sum the wife of Yap Ah Shak. This is because the Registration Department has no records of death and the date 13 June 1951 was merely based on a letter dated 2 September 1953 from Yap Phooi Fong to the Registrar of Birth and Deaths, Selangor which is about two years after the alleged date of her death. Here, I find that there is no cogent evidence that Shum Poh Sum died on 13 June 1951.

[29] I also find that the defendant's contention that Shum Poh Sum had only one son, Yap Fatt Yew and Yap Chin Fook was the son of Yap Ah Shak's other wife is against the available evidence before this court and untenable. The defendant also could not name this other wife of Yap Ah Shak or where she was buried.

[30] The plaintiff also testified that his family dialect is Hakka and his family originates from Fei Yang in Kwong Thong, Hui Zhou. The articles and write-ups on Yap Ah Shak produced before this court also shows that Yap Ah Shak as a Hakka and from Hui Zhou.

[31] Having considered the oral testimony of the plaintiff, PW3 and supported by documentary evidence of the inscriptions on the tombstone of Shum Poh Sum and Yap Chin Fook as well as the records of the Kwong Tung Association, I find that the plaintiff has proved that he is the beneficiary of Shum Poh Sum.

[32] Next, the defendant in his testimony among others claims that Shum Poh Sum was his great grandmother, Yap Fatt Yew his grandfather and Yap Phooi Fong was his father. Hence, he is the beneficiary of Shum Poh Sum, the deceased.

[33] It was also the defendant's testimony that Shum Poh Sum was living with his father at No. 53, Jalan Bukit Bintang, Kuala Lumpur until her death in 1951 and the defendant had followed her father to collect rental from the tenant at the said land.

[34] In regards to the documentary evidence, in the lease for mining land for the District of Kuala Lumpur No. 3923, it stated as follows

> ... In consequence of the death on 20th day of December 1935 of Yap Fatt Yew, his undivided shares of the land under this title become transmitted in Yap Phooi Fong as representative as appear by Grant of Letter of Administration dated 4th day of July 1935.

[35] This piece of evidence indicates that Yap Phooi Fong, the defendant's father, was the administrator of the estate of Yap Fatt Yew, who is the son of Madam Shum Poh Sum and Yap Ah Shak.

[36] The plaintiff's income tax returns from 1973 to 1978 also shows the defendant was the assignee of dividend payable to the estate of Yap Fatt Yew and estate of Yap Ah Shak and the birth certificate of the defendant shows that the defendant's father is Yap Phooi Fong.

[37] The combination of oral and documentary evidence adduced in this case, also shows that the defendant too is the beneficiary of Shum Poh Sum's estate.

A **Letter Of Administration Of The Estate Of Shum Poh Sum**

[38] In regards to the letter of administration, the defendant in this case had obtained the letter of administration for the estate of Shum Poh Sum on 16 June 2013.

B **[39]** The plaintiff in his amended statement of claim pleaded that the letter of administration was fraudulently and/or wrongfully obtained by the defendant.

[40] It is trite law that letters of administration may be revoked or amended for any sufficient cause and the test to be applied is an objective test.

C **[41]** Section 34 of the Probate and Administration Act 1959 states as follows:

> Any probate and Letters of Administration may be revoked or amended for any sufficient cause.

D **[42]** Although the words 'sufficient cause' has not been defined under the said Act, the leading cases on this issue has explained what sufficient cause is, that is the due and proper administration of the estate and the interest of the beneficiaries.

[43] Chang Min Tat FJ in *Re Khoo Boo Gong, Decd, Khoo Teng Seong v. Teoh* E *Chooi Ghim & Ors* [1981] 1 LNS 78; [1981] 2 MLJ 68 at p. 69 said this:

> *The power to revoke a grant of probate or letters of administration is vested in the High Court by section 34 of the probate & Administration Act, 1959 (Rev. 1972) and can be exercised for 'any sufficient cause'.* However, there is no definition of what is sufficient cause. *But, if in the words of Jeune, President, in In the* F *Goods of William Loveday, 'the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto', then the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In our view, that is a strictly objective test.*
>
> (emphasis added)

G (see also *Jigarlal Kantilal Doshi v. Damayanti Kantilal Doshi & Ors* [1995] 1 LNS 279; [1995] 3 AMR 2590, *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 1 LNS 340; [1998] 3 MLJ 457).

[44] In the present case, I noted that there are facts adduced by the H defendant in the application for the letters of administration is untrue which was also admitted by the defendant in court. The facts are that the defendant is the only son of his father and only great grandchild of Shum Poh Sum and sole beneficiary. The defendant, in actual fact has a sister, DW3 and two step brother and sister, Harvey and Doris. Doris who has passed away has two sons.

I

[45] In any event, I have to assess this fact in totality with other facts in this case to arrive at a decision, which is for the proper administration of the estate and the best interest of all the beneficiaries.

[46] Before that, s. 34 of the Probate and Administration Act 1959 gives the court the discretionary power to revoke or amend any probate and letters of administration. The word 'may' in this provision is directory in nature and is an enabling provision.

[47] Having considered the totality of evidence with the paramount interest of all the beneficiaries in mind, I find there is no sufficient cause to revoke the letter of administration but there is sufficient cause to amend the said letter of administration.

Conclusion

[48] In the circumstances, the plaintiff's claim for a declaration that the plaintiff is a beneficiary of the estate of Sam Poh Sun @ Shum Poh Sum (the deceased), including the 3/4 undivided share in the piece of land under Geran No. 60391, Lot No. 1, Seksyen 10, Bandar Ampang, Daerah Ulu Langat, Selangor, is allowed.

[49] The court also ordered the plaintiff to be added as a personal representative and beneficiary in the grant as claim in the plaintiff's alternative prayer.

[50] The Senior Assist Registrar of the High Court is to take all necessary action to give effect to this order as prayed for in paras. 10(a) of the statement of claim.

[51] The court also ordered the defendant to pay costs of RM15,000 to the plaintiff and costs is subject to payment of allocatur fee.